No. _____

In The

Supreme Court of the United States

October Term, 1989

RANDY WILLIAM CRIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BENJAMIN H. B. SLEY
Suite 600 – South Tower
MBank Center
500 N. Water Street
Corpus Christi, Texas 78471
(512) 888-8866

P. MICHAEL JUNG
Counsel of Record
SIDNEY POWELL
STRASBURGER & PRICE
4300 NCNB Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The National Park Service's own regulations created a mandatory duty in this case for park rangers to detain a person apprehended while operating a motor vehicle under the influence of alcohol and drugs, and to impound his vehicle. The rangers violated this mandatory duty; as the trial court found, they negligently released an obviously and grossly intoxicated driver without supervision, which the trial court further found to be a proximate cause of profound personal injury to petitioner Crider.

The question presented in this petition is under what circumstances a violation of mandatory federal regulations, in conjunction with state law rendering private persons civilly liable for negligence *per se*, may form the basis for a claim under the Federal Tort Claims Act.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Randy William Crider, the respondent United States of America, and the Texas Industrial Accident Board and the Texas Rehabilitation Commission as intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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The petitioner Randy William Crider respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 10, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 885 F.2d 294. It is reprinted in the appendix to this petition at pp. A-1 – A-14.

The findings of fact and conclusions of law of the United States District Court for the Southern District of Texas have not been reported. They are reprinted in the appendix to this petition at pp. A-15 – A-32.

JURISDICTION

The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The opinion and judgment of the Court of Appeals were entered on October 10, 1989. A suggestion for rehearing *en banc*, which under Fifth Circuit Internal Operating Procedures constitutes and was treated as including a petition for panel rehearing, was denied by an order signed on December 4, 1989, and filed on December 6, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

28 U.S.C. § 1346(b) states in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant

in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 states in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

18 U.S.C. § 13 at the time of the operative events stated:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Tex. Rev. Civ. Stat. art. 6701*l*-1(b) states in pertinent part:

> A person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place.

Tex. Rev. Civ. Stat. art. 6701*l*-1(a)(2) defines "intoxicated" as

> (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

(b) having an alcohol concentration of 0.10 or more.

36 C.F.R. § 4.1 (1983) stated:

> Unless specifically covered by the general and special regulations set forth in this chapter, the laws and regulations of the State within whose exterior boundaries a park area or portion thereof is located shall govern traffic and the operation and use of vehicles. Such State laws and regulations which are now or may hereafter be in effect are hereby adopted and made a part of the regulations in this part.

36 C.F.R. § 4.6 (1983) stated:

> No operator of a vehicle shall be under the influence of intoxicating liquor or drugs.

The Law Enforcement Procedures of Padre Island National Seashore, promulgated on May 9, 1976, state in pertinent part:

> *DWI'S* [Driving While Intoxicated]
>
> Observation made by use of the five senses, driving, physical appearances, smell, etc., to insure suspect is drunk
>
> Advise subject of rights even though drunk and note in report
>
> Request assistance if necessary
>
> Secure vehicle and call tow truck. Impound is made unless vehicle is released by owner to another subject with a valid driver's license
>
> * * *
>
> *DUID* [Driving Under the Influence of Drugs]
>
> Observation made by use of the five senses, driving, physical appearances, ect. [sic] to insure subject is under the influence of narcotics

or drugs. ([I]f in doubt, could run breathalizer for DWI)

Advise of rights even though under the influence, note in report.

Call for assistance if necessary

Secure suspect and impound vehicle – follow guidelines for impoundment of vehicles.

A blood and urine test is administered by _____ at _____ with permission of Supervisor.

Subject is then transported and booked

(Plaintiff's Exhibit 15)

STATEMENT OF THE CASE

This suit was brought under the Federal Tort Claims Act; the jurisdiction of the district court was based on 28 U.S.C. § 1346(b).

At approximately 3:40 p.m. on Saturday, July 23, 1983, while on duty at Padre Island National Seashore near Corpus Christi, Texas, National Park Service Rangers Larry Couser and James Copeland observed a car speeding down the beach at 45 miles per hour in a 15-mph zone, with two hysterical teenage girls clinging to the hood of the car. (R.E. 20-21).[1] The driver, eighteen-year-old John Landry,[2] was grossly intoxicated; the

[1] Record references in this petition will be to the Record Excerpts ("R.E.") in the Court of Appeals or to the Record on Appeal ("R."). The narrative set forth herein is adapted from the district court's findings of fact and conclusions of law, which appear at pp. A-15 – A-32, *infra*.

[2] The minimum drinking age in Texas was then nineteen. Tex. Alco. Bev. Code § 106.01 (as amended 1981).

district court later determined that Landry had consumed fourteen ounces of whiskey and smoked four marijuana cigarettes since noon. (R.E. 22 n.3).

The rangers pursued and stopped the speeding car. Approaching Landry, Ranger Couser (the lead officer) asked angrily, "You trying to kill these girls or what?" The rangers could clearly detect the aroma of alcohol coming from the car. Couser saw Landry drink an unknown quantity of bourbon and Coke from a cup which he was holding, in an effort to destroy the evidence of his drinking. Couser also observed that Landry's eyes were extremely bloodshot, which he knew to be a sign of marijuana intoxication. (R.E. 21).

The rangers ordered Landry out of the car and searched it. They found approximately four grams of marijuana butts and leaves in the ashtray, a homemade marijuana pipe, a nearly empty fifth-gallon bottle of whiskey, and seven unopened bottles of beer. (R.E. 21, as amended at R.E. 32). During the twenty minutes in which Landry was under the rangers' control, (R. VIII 298-99, Ex. 11, 24), Couser learned that Landry had received five prior speeding tickets and had been involved in one prior accident since receiving his driver's license 2½ years earlier. (R. 283-84). There was testimony that Couser also knew that Landry was on probation based on a felony burglary conviction. (R. VII 179).

Notwithstanding the fact that the Law Enforcement Procedures of Padre Island National Seashore (Plaintiff's Exhibit 15) required Landry's detention and the impoundment of his vehicle, Couser did neither of these

things.[3] Couser instead told Landry, "This is your lucky day. I'm not going to write you up for drunk driving because if I did, I'd have to take you in to Kleberg County." (R.E. 21-22, as amended at R.E. 32).[4] He told Landry to drive over to some barricades near the water and to "sober up" for an hour and a half before driving his car again. Couser did not confiscate Landry's car keys, but warned him that an arrest warrant would be issued if Landry left early. (R.E. 23).

Telling the two teenage girls that Landry was drunk and that "[i]t would be dangerous if you were to go home with him," Couser took the girls to the Ranger Station to call their parents to pick them up. (R.E. 22). When the rangers left the scene, Landry immediately drove off at high speed. (R.E. 23). Although Copeland later noticed that Landry had left early in defiance of Couser's instructions, Couser did nothing to order the threatened arrest when informed of this fact. (R.E. 24).

Landry, realizing that the citations written by Couser would likely result in his burglary probation being revoked, decided to "live it up one more time" before going back to jail. He bought two more bottles of whiskey and "drank it up" with friends for the remainder of the evening. Some time after midnight, Landry left his house to take a friend home. He was still drunk; a few hours later,

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[3] Ranger Copeland, on the other hand, testified that he would have booked Landry for drunkenness. (R.E. 23).

[4] Couser issued four citations to Landry, for possession of a controlled substance, possession of alcohol by a minor, speeding, and failure to have mandatory liability insurance. (R.E. 22-23; R. VII 53, 180; R. VIII 268).

his blood alcohol level would be measured at .104. At 1:40 a.m., while driving eighty miles an hour and attempting to pass three cars at once on a narrow two-lane road, Landry collided with an oncoming motorcyclist, plaintiff Randy Crider, in Crider's lane. Crider's left arm was traumatically severed in the accident; his crushed left leg had to be amputated surgically. (R.E. 24-25).

The government stipulated at trial, and the district court found, that Couser had had probable cause to arrest Landry. (R.E. 23, 29). Based upon expert medical and law enforcement testimony, the district court found that Rangers Couser and Copeland knew or should have known that Landry would, if not detained, continue looking for alcohol and marijuana to sustain his state of euphoria, until the intervention of some dramatic event such as death, injury, or arrest. (R.E. 26-27, 29). It therefore found that it was reasonably foreseeable to the rangers that Landry would remain intoxicated on the evening of July 23, and that his impaired state would make him a danger to others. (R.E. 30).[5] Concluding that the rangers had failed to exercise reasonable care in their control over Landry, (R.E. 29), the district court held that the rangers' conduct in releasing Landry without supervision had been negligent and had proximately caused Crider's injuries. (R.E. 29-30). The court awarded damages of $7,500,000. (R.E. 12).[6]

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[5] Apart from the foreseeability of further drinking, the district court found that Landry was at the time of the accident still under the residual effects of his initial early afternoon intoxication. (R.E. 26, 30).

[6] Employing a novel approach, the district court ordered Crider to invest most of these funds in certain annuities and

(Continued on following page)

The Court of Appeals for the Fifth Circuit reversed, holding that Texas law imposed no actionable duty on the rangers under the circumstances of this case. *Crider v. United States*, 885 F.2d 294 (5th Cir. 1989). The Court of Appeals did not address whether the National Park Service's own regulations imposed such a duty in conjunction with the state law of negligence.

REASONS FOR GRANTING THE WRIT

This case presents a question of considerable importance to the administration of the Federal Tort Claims Act ("FTCA"), upon which this Court has touched obliquely in recent cases but which it has never specifically addressed: the role of mandatory federal regulations in determining the application of the state law tort duty which forms the basis for an FTCA claim.

There can be no serious question in this case that Rangers Couser and Copeland violated a mandatory duty, imposed on them by the Law Enforcement Procedures of Padre Island National Seashore, to detain Landry (who was a person operating a motor vehicle under the obvious and overwhelming influence of alcohol and marijuana) and to impound his vehicle. There can likewise be no doubt that the purpose of these mandatory

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(Continued from previous page)

trust funds. The United States was made the remainder beneficiary under the trusts upon Crider's death or the expiration of the trusts' duration. (R.E. 12-14). Crider did not object to or appeal from this aspect of the judgment.

procedures, as well as that of the federal regulations and assimilated Texas penal statutes prohibiting the operation of a motor vehicle in a national park while under the influence of alcohol or drugs, is to protect the travelling public (including petitioner Crider) against the well-known dangers of drunken driving, which constitute a national scourge of tragic proportion.

This Court has twice recently decided FTCA cases involving violation of mandatory federal regulations; in each case, the Court removed a perceived impediment to FTCA liability. In *Sheridan v. United States*, 487 U.S. 392 (1988), a case which bears considerable factual similarity to the present, the Court rejected the applicability of the "assault and battery" exception of 28 U.S.C. § 2680(h) to an FTCA claim based on the negligence of naval corpsmen in allowing an armed and intoxicated naval aide to remain at large and ultimately to assault a civilian. There the Navy had adopted mandatory regulations prohibiting possession of firearms on the naval base in question and requiring all personnel to report the presence of any such firearm. The corpsmen violated these regulations by allowing the aide to leave the base without restraining or even reporting him, and the aide's roommate violated them by failing to report his possession of a weapon. Although this Court pretermitted the question of whether these facts would support recovery against a private person under the local state law, 487 U.S. at ___ & n.6, 108 S. Ct. at 2455 & n.6, it obviously contemplated that the lower courts would take the naval regulations into account in deciding that question on remand.

In *Berkovitz v. United States*, 486 U.S. 531 (1988), decided eleven days before *Sheridan*, the Court was concerned with another aspect of FTCA liability: the "discretionary function" exception of 28 U.S.C. § 2680(a). There, too, the government had violated its own mandatory regulations, this time by licensing an oral polio vaccine without following the prescribed regulatory analysis to determine compliance with applicable safety standards. The Court held that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." 486 U.S. at ___, 108 S. Ct. at 1958-59. Again the effect of the mandatory regulations on the analysis of state law liability questions was not discussed, the district court having ruled that a claim was stated and that issue not being included among the matters certified for interlocutory appeal.

This case presented the Court of Appeals with the question which this Court had not been called upon to address in *Sheridan* and *Berkovitz*: the effect of mandatory federal regulations on the existence of a state law duty in an FTCA case. In its analysis of the state law duty question, however, the Court of Appeals failed even to acknowledge the rangers' violation of the mandatory Law Enforcement Procedures, much less to consider the interaction of that violation with the state law of negligence liability. In doing so, it effectively ruled that these regulations necessarily had *no* effect on the question of duty. This was a significant error of federal law which warrants intervention by this Court.

Circuit court jurisprudence on the effect of mandatory federal regulations in FTCA cases has not been uniform. The Sixth Circuit put it well in stating that "[t]he authorities are not entirely harmonious concerning the interplay of state negligence law and the federal statute or regulations under which the agency accused of negligence is operating." *Schindler v. United States*, 661 F.2d 552, 560 (6th Cir. 1981). Some courts have held, explicitly or implicitly, that such regulations can give rise to FTCA liability only through application of the "Good Samaritan" doctrine of Restatement (Second) of Torts §§ 323 & 324A (1965) and *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955). *E.g.*, *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1158 (D.C. Cir. 1985); *Sellfors v. United States*, 697 F.2d 1362, 1367 (11th Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984); *Schindler v. United States*, 661 F.2d at 560. A variation on this theme treats federal regulations applicable to the conduct of federal employees as necessarily analogous only to a private employer's rules governing his own employees' conduct, and hence capable of creating a tort duty to the public only under the Good Samaritan doctrine. *E.g.*, *United Scottish Insurance Co. v. United States*, 614 F.2d 188, 193 (9th Cir. 1979); *Zabala Clemente v. United States*, 567 F.2d 1140, 1144 (1st Cir.), *cert. denied*, 435 U.S. 1006 (1978). A few decisions beg the question entirely, stating in circular fashion that the federal regulations are irrelevant unless a state law duty exists, without addressing the potential role of the regulations in creating that state law duty. *E.g.*, *Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 562 (8th Cir. 1979); *see Hylin v. United States*, 715 F.2d 1206, 1210 (7th Cir. 1983) (dictum).

Missing from all of these cases is a reasoned analysis of the applicability of the state law of negligence *per se*, which is either ignored completely or summarily dismissed as not "automatically" applicable to the violation of federal regulations. A few more recent cases have in fact acknowledged the potential applicability of the negligence *per se* doctrine to the government's violation of its own regulations. *See Dyer v. United States*, 832 F.2d 1062, 1065-66 (9th Cir. 1987) (analyzing negligence *per se* claim based on Coast Guard helicopter's alleged violation of Federal Aviation Regulations and finding no violation); *Moody v. United States*, 774 F.2d 150, 157 (6th Cir. 1985) (accepting general applicability of negligence *per se* doctrine but finding that regulation at issue failed to meet elements of that doctrine), *cert. denied*, 479 U.S. 814 (1986).[7] Even these cases, however, fail to establish any coherent analytical framework for application of negligence *per se* principles in FTCA cases.

The touchstone of FTCA liability is of course the corresponding liability of a private person under like circumstances *as established by state law. E.g., United States v. Muniz*, 374 U.S. 150, 153 (1963); 28 U.S.C. § 1346(b). Thus the state law of negligence *per se* is indeed "automatically" applicable in FTCA cases, just as every other

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[7] *Cf. Lutz v. United States*, 685 F.2d 1178, 1184 (9th Cir. 1982) (rejecting negligence *per se* doctrine as creating duty but finding separate state law duty and employing regulation to define standard of care). *See also Underwood v. United States*, 356 F.2d 92, 98-99 (5th Cir. 1966) (employing regulations to define standard of care). *See generally* Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. Chi. L. Rev. 1300, 1307 (1987) (advocating reliance on negligence *per se* doctrine in analyzing FTCA liability arising out of violation of federal regulations).

aspect of state tort law is "automatically" applicable. If in a particular state it is negligence *per se* to fail to stop at a stop sign in violation of a traffic regulation, then the United States will be subject to the negligence *per se* doctrine if its vehicle does so. *E.g., Muhammad v. United States*, 366 F.2d 298, 301-02 (9th Cir. 1966), *cert. denied*, 386 U.S. 959 (1967). And if the state in question applies negligence *per se* principles to the violation of federal regulations by private persons, then the government vehicle will not be absolved of liability for negligence *per se* merely because the intersection is a federal intersection and the traffic regulation is a federal regulation.

The fact that negligence *per se analysis* is automatically applicable in FTCA cases involving violation of regulations does not mean that negligence *per se liability* will automatically exist in such cases. The negligence *per se* doctrine does not create liability for every violation of a statute or regulation, but only where certain carefully delineated criteria are satisfied. Texas, for example, requires not only a violation, but that the purpose of the statute or regulation in question be to protect against the kind of injury which has occurred, *e.g., East Texas Motor Freight Lines v. Loftis*, 148 Tex. 242, 223 S.W.2d 613, 615 (1949) (statute); *Continental Oil Co. v. Simpson*, 604 S.W.2d 530, 534 (Tex. Civ. App. – Amarillo 1980, writ ref'd n.r.e.) (regulation), and that the injured party be within the class of persons which the statute or regulation was designed to protect, *e.g., Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985); *Missouri Pacific Railroad v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). Thus a federal employee's violation of a mandatory federal regulation which was enacted not for the protection of the

public but instead for the furtherance of the government's own internal functions will not trigger application of the negligence *per se* rule. *Moody v. United States*, 774 F.2d at 157 (no liability where FmHA regulation imposing duty of inspection expressly stated that its sole purpose was to promote FmHA's lending function). The guiding principle, however, is not some overriding federal law gloss as to the effect of federal regulations in FTCA cases but rather the conscientious application of state law tort doctrine to those regulations.

The concern of some courts that application of negligence *per se* principles to regulations governing the conduct of federal employees would inappropriately limit the government's ability to require more of its employees than tort law requires, *see United Scottish Insurance Co. v. United States*, 614 F.2d at 193; *Zabala Clemente v. United States*, 567 F.2d at 1144, can easily be accommodated within this very same state law framework. Even where the basic elements of negligence *per se* liability are present (*e.g.*, violation of an enactment whose purpose is to prevent the kind of injury which occurred and to protect the kind of person who was injured), application of the doctrine is not automatic but instead depends on a judicial policy judgment that the enactment sets an appropriate standard of conduct by which to measure civil liability. *E.g., Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278-79 (Tex. 1979) (finding statute in question too far removed from proper standard of civil liability to warrant application of negligence *per se* doctrine). Thus if a particular regulation is judicially regarded as requiring federal employees to exceed minimum standards of conduct

rather than as acknowledging and defining such standards, application of the negligence *per se* doctrine will not be warranted. That determination, however, necessarily rests on case-by-case analysis of the regulation at issue and not on an *a priori* determination that regulations governing federal employees can never establish tort standards of conduct.

The question of duty is central to this case: the Supreme Court of Texas has stated that "whenever the duty of restraining another arises, and the power of control over him exists, liability will follow upon a failure to perform the duty." *Missouri, K. & T. Railway Co. v. Wood*, 95 Tex. 223, 66 S.W. 449 (1902). The Court of Appeals found that there was no state law duty requiring the rangers to detain Landry, to impound his vehicle, or indeed to act in any particular manner with respect to him. In light of *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983), *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987), and Restatement (Second) of Torts § 319 (1965),[8] that decision is questionable even if negligence *per se* is not considered. In any event, however, the Court of Appeals erroneously failed to recognize that the negligence *per se* doctrine may not only define conduct which

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[8] Section 319 states: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." The Court of Appeals' statement that "Section 319 does not represent Texas law," *Crider v. United States*, 885 F.2d at 300, is disingenuous at best in light of the Supreme Court of Texas' reliance on and quotation of that section in *Otis Engineering Corp. v. Clark*, 668 S.W.2d at 311 & n.2.

constitutes a breach of an independently existent duty but may also serve to create a duty which would not otherwise exist. *See, e.g., El Chico Corp. v. Poole*, 732 S.W.2d at 312 (finding common law "dram shop" duty but holding that, "[s]eparate and apart" from common law duty, statute created tort duty based on negligence *per se*).[9] Thus a tort duty did arise in this case, not necessarily from the regulation itself, nor (under the Court of Appeals' holding) from the state law itself, but from the synergistic interaction between state tort law and the federal regulation.

The concept that federal regulations may by operation of state law create an actionable tort duty is well illustrated by *Doggett v. United States*, 875 F.2d 684 (9th Cir. 1989), a case remarkably similar to the present as to both its factual situation and the legal issues involved in it. There a naval security guard allowed an observably intoxicated serviceman to drive out of a naval base, in violation of a mandatory regulation requiring the serviceman's detention. The intoxicated driver thereafter crossed the centerline of the highway, striking the plaintiff and causing him severe and disabling injuries. The Ninth Circuit held that the mandatory naval regulation, in conjunction with a California statute creating liability for public entities which cause injury by violating a mandatory enactment designed to prevent an injury of like kind,

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[9] *See also Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985) (municipal ordinance requiring secure closure of vacant building created general duty of reasonable care to rape victim who would otherwise have been a trespasser protected only by minimal duty to avoid willful and wanton injury).

created an actionable duty under the FTCA, even though it expressly held that no duty would otherwise exist under California law. 875 F.2d at 689-93 & n.4. Although Texas has no similar statute, the elements of the California statute bear a close and obvious resemblance to the elements of the negligence *per se* doctrine as applied in Texas and elsewhere.

Petitioner Crider is fully mindful of this Court's reluctance to reexamine questions of state law passed upon by the courts below, *e.g., Sheridan v. United States*, 487 U.S. at ___, 108 S. Ct. at 2455, and does not ask the Court to do so in this case.[10] What is before the Court is the federal law question of the proper mode of analysis of a breach of mandatory federal regulations in the context of the state law of negligence *per se*. With the removal of the obstacles addressed in *Sheridan* and *Berkovitz*, that question will be a recurrent one in Federal Tort Claims Act cases in the years to come. The time is thus ripe for this Court to declare that, in the FTCA context as well as in other contexts, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their

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[10] The Supreme Court of Texas will shortly speak on some of the state law issues addressed by the Court of Appeals in this case. On November 29, 1989, the Supreme Court of Texas heard oral argument in *Travis v. City of Mesquite*, No. C-8576 (Tex.), a case in which an innocent party was injured in a collision resulting from the high-speed chase of a suspect by police. A reversal in *Travis* would seriously undercut the precedential value of *Dent v. City of Dallas*, 729 S.W.2d 114 (Tex. App. – Dallas 1986, writ ref'd n.r.e.), *cert. denied*, 485 U.S. 977 (1988), upon which the Court of Appeals relied heavily in its analysis of state law in this case.

own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

The moral responsibility, if not the legal responsibility, of those who assume control of a drunken driver is obvious and overwhelming. This Court has likened cases such as the present to "cases in which a person assumes control of a vicious animal, or perhaps an explosive device." *Sheridan v. United States*, 487 U.S. at ___, 108 S. Ct. at 2456. The Supreme Court of Texas has employed language no less forceful and picturesque, stating that the risk and likelihood of injury from drunken driving "is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall." *El Chico Corp. v. Poole*, 732 S.W.2d at 311. The federal regulation in this case, in conjunction with the law of negligence *per se*, supplies what the Court of Appeals erroneously found wanting: a basis for translating the general societal responsibility for preventing drunk driving into a specific, actionable duty on the part of the rangers, which they breached by turning loose a seriously intoxicated driver to prey on the driving public.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted,

BENJAMIN H. B. SLEY
Suite 600 – South Tower
MBank Center
500 N. Water Street
Corpus Christi, Texas 78471
(512) 888-8866

P. MICHAEL JUNG
Counsel of Record
SIDNEY POWELL
STRASBURGER & PRICE
4300 NCNB Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724

APPENDIX

INDEX TO APPENDIX

Randy William CRIDER,
Plaintiff-Appellee,

v.

UNITED STATES of America,
Defendant-Appellant.

No. 88-2944.

United States Court of Appeals,
Fifth Circuit.

Oct. 10, 1989.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE and JONES, Circuit Judges, and HUNTER,* District Judge.

EDITH H. JONES, Circuit Judge:

Randy William Crider brought this action under the Federal Tort Claims Act[1] ("FTCA") seeking recovery for tragic injuries he suffered in a collision between his motorcycle and an automobile driven by an intoxicated driver. Crider contends that his injuries were proximately caused by the negligence of the United States Park Rangers who failed to take the intoxicated driver into custody when they stopped him ten hours before the accident. After a non-jury trial the district court awarded Crider $7.5 million in damages. Having determined that Texas tort law will not support a finding of negligence against the government in this case, we must reverse.

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*District Judge of the Western District of Louisiana sitting by designation.

[1] 28 U.S.C. §§ 1346(b), 2671, *et seq.* (1982).

BACKGROUND

At approximately 3:40 p.m. on July 23, 1983, two park rangers of the United States Park Service stopped a car driven by eighteen year old John Landry. The rangers had observed Landry speeding along the beach at the Padre Island National Seashore with two teenage girls hanging onto the hood of his car. Upon stopping Landry, the rangers detected the aroma of alcohol on his breath and searched the car. They discovered approximately four ounces of marijuana butts and leaves, a homemade pipe for smoking marijuana, a partially empty bottle of whiskey, and eight bottles of beer. One of the rangers testified that Landry had extremely red eyes, a symptom of marijuana smoking.

Though the district court found that Landry was intoxicated at the time he was stopped, the rangers did not charge him with driving while intoxicated or arrest him. Instead, the rangers issued Landry citations for possession of a controlled substance, possession of alcohol by a minor, speeding, and failure to have mandatory liability insurance. The citations required Landry to appear before a United States Magistrate the following Monday. One of the rangers instructed Landry not to drive for an hour and a half so that he could sober up. The rangers then left to take the two girls back to the their station and arrange other transportation for them.

Ignoring the ranger's instructions, Landry left the scene immediately after the rangers did. Later that day he picked up a friend, James Wallace, illegally purchased more whiskey, and went home to "drink it up" with his

friends. Throughout the evening and into the early morning Landry continued to drink alcohol and smoke marijuana. Sometime after midnight, Landry took Wallace home. On his way back he collided with the motorcycle ridden by Randy Crider. The accident occurred at 1:40 a.m., as Landry attempted to pass three cars while driving 80 miles per hour. Crider suffered a severed left arm as a result of the collision, and his left leg was later amputated above the knee because of its severe mutilation.

In this FTCA action, Crider alleges that the park rangers were negligent in not arresting Landry and that such negligence was a proximate cause of his injuries. The district court, after a non-jury trial, ruled that the rangers had been negligent and held the United States liable for Crider's damages.

The United States raises four issues on appeal. First, the government argues that it cannot be held liable because law enforcement decisions like those made by the park rangers fall within the "discretionary function" exception of the FTCA. 28 U.S.C. § 2680(a) (1982). Second, the government asserts that Texas law imposed no tort duty on the rangers to restrain an intoxicated driver. Third, it is contended that the district court erred in holding that the rangers' alleged negligence, ten hours before the accident, was a proximate cause of Crider's injuries. Finally, the government asserts that the district court erred in awarding a structured judgment and in failing to make the findings of fact required to justify the damages awarded. We limit our analysis to the duty issue, since it is dispositive.

ANALYSIS

Under the FTCA, the United States is liable for the negligence of its employees "in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674 (1982). In determining whether a "private person" would be liable, we are to look to the law of the state "where the act or omission occurred." 28 U.S.C. § 1346(b) (1982); *see Rayonier, Inc. v. United States*, 352 U.S. 315, 318, 77 S.Ct. 374, 376, 1 L.Ed.2d 354 (1957). Principles of Texas tort law accordingly govern the question of the United States' liability in this case.

The dispositive inquiry here is the first question addressed in all negligence cases: whether the defendants, the park rangers, owed a duty to the plaintiff. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). Texas law furnishes two types of authority with regard to duty, either of which arguably determines whether a "private individual" would be liable to Crider "under like circumstances." Texas courts have rejected the proposition that a law enforcement officer may owe a duty to arrest or restrain a suspect in order to prevent third-party injuries. On the other hand, commencing with *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex.1983), the state supreme court created a duty resting upon an employer of a visibly intoxicated employee to prudently restrain the employee from causing harm to third parties. Under examination, neither type of case supports a duty owed by the park rangers to Crider.

A. *Law enforcement officer's duty.*

The government contends that the FTCA, in abrogating sovereign immunity where a "private individual" would be liable "under like circumstances," precludes us from considering whether Texas recognizes some duty on the part of law enforcement officers. By contrast in *Louie v. United States*, 776 F.2d 819, 825 (9th Cir. 1985), a case closely analogous to this one, the government prevailed in its assertion that

> Reference to Washington law, setting forth the liability of state and municipal entities to establish the government's standard of liability under the FTCA, is both necessary and proper. *Id.*

Under the special circumstances involved, we think the government got it right in *Louie*. We are not looking to state law insofar as it immunizes a public entity from liability; rather, we are seeking "like circumstances" which best articulate a state's negligence law.

Mr. Louie's widow filed suit under the FTCA because her husband died in a collision with a drunken off-duty soldier. She alleged that the military police, who fetched the soldier back to Fort Lewis after his off-post citation for driving while intoxicated, should have kept him in custody until he became sober. They did not do so, and the fatal accident occurred a few hours later.

The Ninth Circuit first addressed whether Washington's law of municipal corporations or of a private special relationship was the proper vehicle for assessing FTCA liability. The court conducted its analysis under both lines of authority, but it concluded that municipal liability principles were controlling. The court reasoned:

> The circumstances here involve government employees in a law enforcement function. Questions as to the power and authority to arrest, to maintain custody, and to lawfully restrict a person's liberty are unique to the law enforcement function. Because private persons do not wield such police powers, the inquiry into the government's liability in this situation must include an examination of the liability of state and municipal entities "under like circumstances."

Louie v. United States, 776 F.2d 819, 825 (9th Cir.1985). This interpretation of "like circumstances" seems compelling. We must disregard state rules of sovereign or official immunity in analyzing the scope of FTCA liability, because these conflict with Congress's analogy to "private person" liability under § 2674. *See United States v. Muniz*, 374 U.S. 150, 164, 83 S.Ct. 1850, 1859, 10 L.Ed.2d 805 (1963); *Wright v. United States*, 719 F.2d 1032, 1034-35 (9th Cir.1983). Similarly, the performance of a "uniquely governmental function" has repeatedly been rejected as a defense to FTCA liability. *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S.Ct. 374, 376, 1 L.Ed.2d 354 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 76 S.Ct. 122, 124, 100 L.Ed. 46 (1955); *B & F Trawlers, Inc. v. United States*, 841 F.2d 626, 630-31 (5th Cir.1988). These rules should not, however, require us to ignore a state's law enunciating negligence principles based on "like circumstances" without regard to local sovereign immunity. In *Louie*, Washington State had waived sovereign immunity, and the court went on to find that employees of political subdivisions there owe no duty to a given member of the public such as Mr. Louie.

Texas courts have twice considered on the merits, irrespective of official or sovereign immunity claims,

whether a police officer has any tort duty to protect the public from acts of a criminal suspect.[2] Each time, the court declined to impose any such duty. *Dent v. City of Dallas*, 729 S.W.2d 114, 116 (Tex.App. – Dallas 1986, writ ref'd n.r.e.); *Munoz v. Cameron County*, 725 S.W.2d 319, 321-22 (Tex.App. – Corpus Christi 1986, no writ).

In *Dent*, the statutory beneficiaries of an innocent motorist killed in a collision with a suspect trying to evade police sought to recover from the officer who had failed to arrest the suspect promptly and from the officer's employer, the City of Dallas. The court observed that "[w]hether a police officer owes a special duty to one injured or killed by a person whom the officer had probable cause to arrest, but either elected not to do so or made an inadequate attempt to arrest, is a question of first impression in this state." *Dent*, 729 S.W.2d at 116. Other states, however, have "uniformly held that the officer's duty is a duty to the public at large to enforce the criminal law and that the officer owes no special duty to the individual injured." *Id.* Following this "public duty" rationale, the court concluded that the officer had breached no actionable duty to the deceased. The court's decision rejected a finding of duty in broad terms:

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[2] In his brief, Crider cites *State v. Terrell*, 588 S.W.3d 784 (Tex.1979); *Eubanks v. Wood*, 304 S.W.3d 567 (Tex.Civ.App. – Eastland 1957, writ ref'd n.r.e.); and *Asher v. Cabell*, 50 F. 818 (5th Cir.1892), for the general proposition that a police officer can be liable for his own negligence under Texas law. Since none of those cases involved the issue of an officer's liability for failing to make an arrest, they do not involve "like circumstances" to the present case.

> Appellants are seeking to hold the City of Dallas and one of its police officers liable for the officer's discretionary decisions as to if, how, and when to arrest a person suspected of attempting to pass a forged prescription. If we were to uphold the finding of liability on the part of Officer Reed for his actions, then, to avoid liability, police officers would have to *arrest all persons* stopped by them for whatever reason (be it jaywalking, expired license tags, etc.) lest these persons attempt escape and cause injury to somebody during their flight from justice. Sound jurisprudence as well as the public interest could not tolerate such a holding.

Dent, 729 S.W.2d at 116.

Similarly, in *Munoz*, the plaintiffs sought to recover for the alleged negligence of a county sheriff in failing to promptly execute an arrest warrant on the plaintiffs' father, who subsequently shot and killed their mother. In concluding that the sheriff owed the plaintiffs no actionable duty, the court followed the "public duty" rationale, holding that while a sheriff does owe a duty to execute arrest warrants, that duty is owed to the public at large, not to any individual plaintiff. *Munoz*, 725 S.W.2d at 321-322.

Absent a strong indication that the Texas Supreme Court would decide the case differently, decisions of the Texas courts of appeals are controlling on questions of state law in this court. *Mott v. Mitsubishi International Corp.*, 636 F.2d 1073, 1074 (5th Cir. Unit A Feb. 1981).

Thus, under existing Texas law a police officer owes no duty to a specific plaintiff to arrest a suspect.[3]

B. *Duty of a Private Person for Conduct of an Intoxicated Person.*

If we examine the liability of the United States in terms of the duty of ordinary private citizens in Texas, we reach the same result. The district court found that the rangers owed Crider a duty to restrain Landry based on *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex.1983). However, the duty established in *Otis Engineering* is inapplicable to this case.

Otis Engineering was a wrongful death case brought by the survivors of two women killed in an accident with an intoxicated Otis employee. The employee's supervisor had sent him home after discovering that he was intoxicated on the job, and the fatal accident occurred on the employee's way home. Whether Otis owed any duty to

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[3] *Dent* and *Munoz* did not deal specifically with the failure to restrain a drunk driver. A clear majority of the states that have considered the exact question whether a police officer can be liable for failing to restrain a drunk driver have applied the same "public duty" rationale followed by *Dent* and *Munoz*, and have concluded that the officer owed no duty to the injured plaintiff. *E.g.*, Annotation, *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer*, 48 A.L.R. 4th 320 (1986); *Barratt v. Burlingham*, 492 A.2d 1219 (R.I.1985) (cited in *Munoz*); *Shore v. Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982) (cited in both *Dent* and *Munoz*); *Harris v. Smith*, 157 Cal.App.3d 100, 203 Cal.Rptr. 541 (1984); *see also Louie v. United States*, 776 F.2d 819 (9th Cir.1985) (applying Washington Law).

the decedents was the issue. The Texas Supreme Court recognized that as a general rule a person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control. *Otis Engineering*, 668 S.W.2d at 309. The Court nevertheless determined that where "because of an employee's incapacity, an employer exercises control over the employee the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others." *Id.* at 311.

Two factors in *Otis* appear critical to the duty it created: the employer-employee relationship and the "affirmative act" by Otis in sending the employee home.[4] No Texas court has expanded *Otis Engineering* to a relationship other than that of employer-employee. *See Shankle v. United States*, 796 F.2d 742, 746 (5th Cir.1986).[5] In addition, the Texas courts of appeals, in applying *Otis Engineering*, have made it clear that "for an employer to

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[4] The State Supreme Court held, "we do not view this as a case of employer nonfeasance." 668 S.W.2d 309-310.

[5] Since *Shankle* was decided the Texas Supreme Court has decided *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex.1987), in which the court imposed "dram shop" liability by holding sellers of alcohol liable when they serve intoxicated customers who are subsequently involved in accidents. *El Chico, supra.* The duty created in *El Chico* is a narrow one, *see Walker v. Children's Services, Inc.*, 751 S.W.2d 717 (Tex.App. – Amarillo 1988, writ. denied) (refusing to expand the duty created in *El Chico* to social hosts); *La Fleur v. Astrodome – Astrohall Stadium*, 751 S.W.2d 563, 565 (Tex.App. – Houston [1st] 1988, no writ) (narrowly construing *El Chico*), and is not applicable to this case.

be held liable under the *Otis Engineering* doctrine, such employer must perform an affirmative act of control over the incapacitated employee." *Moore v. Times Herald Printing Co.*, 762 S.W.2d 933, 934 (Tex.App. – Dallas 1988, no writ). In *Otis Engineering*, the affirmative act of control was sending the employee home. Where employers have merely allowed an intoxicated or incapacitated employee to drive, Texas courts have denied liability. *Moore, supra; Pinkham v. Apple Computer, Inc.* 699 S.W.2d 387, 390 (Tex.App. – Fort Worth 1985, writ ref'd n.r.e.). Since it is not our province to extend the boundaries of Texas law, *Dean v. Dean*, 821 F.2d 279, 284 (5th Cir.1987), we decline to apply *Otis Engineering* beyond the precise contours of that case.

Even if *Otis* should be considered in every Texas drunken driving case, neither the relationship between Landry and the park rangers nor their "affirmative acts" should give rise to a legal duty.[6] The *Otis Engineering* duty appears to arise from a relationship in which Otis not only had the ability to control its employee, but also stood to profit from his work and continued wellbeing. Their relationship was created voluntarily and mutually. The Supreme Court keys its duty holding upon comparison with "a reasonably prudent employer". 668 S.W.2d at

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[6] *Otis Engineering* purports to rely upon a balancing of factors in determining whether the law should impose a duty, including the "risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer." 668 S.W.2d at 309.

311. The trier of fact is instructed to gauge whether Otis fulfilled its duty by "the availability of the nurses' aid station, a possible phone call to Mrs. Matheson [or] having another employee drive Matheson home . . . " *Id.*

No serious comparison can be drawn between an employer-employee relationship and that of Landry and the park rangers. The rangers and Landry did not associate voluntarily or mutually. The rangers could in no way profit or benefit from their relation with Landry. Their ability to "control" him was strictly limited within the confines of their responsibilities. To extend their "control" further would conflict with our libertarian views of the police function. Surely, too, it presses the potential liability of law enforcement officers – or of any group – to the extreme to suggest that just by having contact with a potentially dangerous actor they become responsible in tort for his conduct. *Otis Engineering* disavows any such intent, stating that "a duty . . . would not be based on *mere knowledge* of Matheson's intoxication, but would be based on additional factors." (emphasis in original) 668 S.W.2d at 309.

Additional factors are inherent in the employer-employee relationship that starkly distinguish it from the present case. There is ordinarily a workplace and often a nurses' station or quiet area where an employer could sequester an intoxicated worker while he sobers up. Such facilities will rarely be available to the policeman on the beat – unless he drops everything and becomes unavailable for other duty while he handles the drunk. *Otis Engineering* is willing to impose on employers the cost of an interruption in their business while they tend to an

intoxicated employee, but that cost is objectively quantifiable and not physically risky. Imposing such a cost on law enforcement is entirely different, however, because of the unpredictability and potential danger of the job and the high risk of imposing artificial priorities on it. *Otis Engineering* seems to create a unique species of liability premised on the employer-employee relation.

The other prong of *Otis*, that of an affirmative act of control, poses a more difficult theoretical problem. We address it purely for the sake of argument, as the notion of "control" in *Otis Engineering* seems to relate so closely to the master-servant relationship which we have already found inapplicable for law enforcement. In *Otis Engineering*, as we have noted, the affirmative act of control was held to be sending Matheson home while intoxicated. Without further intervention by Otis, this order was tantamount to putting him on the road in a dangerous condition. Here, by contrast, the park rangers merely failed to deny Landry the opportunity to drive while intoxicated by not arresting him or taking away his car keys. *Compare Moore, supra*. One of them told him not to drive for an hour and a half and threatened an arrest warrant if he ignored that advice. Landry was on the beach, with plenty of room to relax and no clear need to travel. Thus, the officers' actions by no means foreordained that Landry would drive while still seriously intoxicated. The essence of Crider's claim is not an affirmative act of control as in *Otis Engineering* but the officers' failure to exercise further control by effecting an arrest. Neither the special relationship evident in *Otis Engineering* nor the affirmative act of control present there can support the imposition of a tort duty upon the park rangers.

In his brief, Crider also relies on § 319 of the Restatement (Second) of Torts which provides:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

RESTATEMENT (SECOND) OF TORTS § 319 (1986). Crider argues that under this section the rangers owed him a duty to restrain Landry. This argument, while initially appealing, cannot withstand analysis. Section 319 does not represent Texas law. Moreover, Section 319 imposes a duty on one who "takes charge" of a dangerous person. Here, the entire basis of Crider's lawsuit is his claim that the rangers failed to "take charge" of Landry by failing to arrest him. Section 319 is inapplicable.

CONCLUSION

We conclude that a "private individual" would not be liable under "like circumstances" because Texas law would not impose a duty upon either a police officer or an individual citizen to restrain a drunk driver in a case such as this. Accordingly, the United States is not subject to liability under 28 U.S.C. § 2674, and the decision of the district court imposing liability must be REVERSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

RANDY W. CRIDER, MILA A. CRIDER, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, v. LIQUID TOWN, INC. Third Party Defendant. TEXAS INDUSTRIAL ACCIDENT BOARD, TEXAS REHABILITATION COMMISSION, Intervenors.	NO. C-84-261 FINDINGS OF FACT AND CONCLUSIONS OF LAW

[July 14, 1988]

Plaintiff Randy Crider has brought this action claiming that negligent acts and omissions of National Park Service Rangers Larry Couser and James Copeland contributed to his tragic injuries.

Couser and Copeland are employees of the United States Department of the Interior.

This is one of those rare cases that turns almost exclusively upon the credibility of the witnesses.

The following constitutes this Court's finding of the facts which led to plaintiff's injuries and its conclusions of law as to defendant's liability. Any finding of fact which may be considered a conclusion of law shall be deemed a conclusion of law, and any conclusion of law which may be considered a finding of fact shall be deemed a finding of fact.

I

FINDINGS OF FACT

At approximately 10:00 A.M. on Saturday morning, July 24, 1983, Debbie Jones and Theresa Matthews (both 15 years of age), who lived just around the corner from each other, called friend John Landry (age 18) and asked if he would take them to the Padre Island National Seashore near Corpus Christi, Texas.

Landry agreed, and picked them up in his green 1968 4-door Oldsmobile at approximately 12:00 noon. Since he had previously smoked marijuana with Debbie, he rolled and brought along between 4 and 6 marijuana cigarettes. He also brought along a partially empty fifth of Jim Beam Whiskey containing approximately 21 ounces of liquor, a large plastic bottle of Coca Cola, some plastic coated drinking cups, 2 six-packs of beer, and a "bong" (a homemade pipe for smoking marijuana).

After they arrived at the beach the girls went for a walk and Landry apparently stayed in the car. It is unclear whether he smoked marijuana or drank any liquor or beer at that time. Subsequently, the group drove down

to an area at county beach called "Party House," a portion of the beach where driving on the sand was permitted. The girls went for a walk along the water and Landry stayed in the car. When they returned, Landry asked if they wanted to smoke with him, but they declined. Thereafter, they sat in the sun on the hood of Landry's car while he sat inside drinking some bourbon and cola, and smoking some marijuana. A short while later, the girls teased Landry about another boy who drove them at high speeds down the beach while they were lying on their stomachs on the hood of the car facing the windshield and hanging onto the edge of the hood at the open space where it joins the windshield.

Thus challenged, and after some more whiskey, coke and marijuana, Landry proceeded to race down the beach with the girls hanging on the hood of his green Oldsmobile. He had achieved extremely high speeds, by his testimony up to 75 miles an hour, thoroughly frightening the girls who screamed at him to slow down. Landry testified that once he reached 75, he took his foot off the accelerator and allowed the car to slow down. At about this time the National Park rangers picked Landry up on their radar doing at that time 45 miles per hour in a 15 mile zone. The rangers also had visual field glass contact on Landry and observed him speeding toward them with the hysterical girls on the hood. The rangers proceeded up the beach past Landry, made a U-turn to get behind him, gave him the lights, and pulled him over. Ranger Couser approached the driver's side of the car and asked Landry angrily, "You trying to kill these girls or what?" In an effort to destroy the evidence of having been drinking alcohol, Landry, in the presence of the officer,

finished off the unknown amount of bourbon and coke in the cup, and in response to an inquiry from Couser, stated it was merely coke. However, the rangers could clearly detect the aroma of alcohol and ordered him out of the car. They thereafter searched the car and recovered approximately 4 ounces of marijuana butts and leaves from the ashtray in the dashboard of the vehicle, the "bong" which was found on the front passenger seat, the whiskey bottle (now containing only approximately 7 ounces of whiskey), 8 unopened bottles of beer, the half-empty bottle of coke, and some plastic coated drinking cups.

Couser observed in his report of the incident that Landry's eyes were extremely bloodshot, known to be a sign of marijuana ingestion. He read Landry and the girls their rights, and then said to Landry, "This is your lucky day. I'm not going to write you up for drunk driving because if I did, I'd have to take you in to Claiborne County" (a 135 mile round trip).[1]

Couser claims he gave Landry his standard roadside sobriety test, which he passed. Despite including many other details in his written report, including his observation of the bloodshot eyes, Couser failed to report the sobriety test or its results, and there was substantial conflict in the testimony as to whether Couser did give Landry the alleged test.[2] However, whether or not the

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[1] There was testimony that another reason he did not book Landry was fear of antagonizing the United States Magistrate by requiring his appearance over the weekend.

[2] Couser said he gave the test. Landry and the girls said that no tests were given. Ranger Copeland affirmed that tests

(Continued on following page)

test was given is immaterial. The Court finds that Landry was unquestionably intoxicated at that time.[3]

Couser then told the girls, "Come with me; he's drunk. It would be dangerous if you were to go home with him," and took the girls to the Ranger Station to call their parents to come and pick them up. Before departing, he issued Landry four traffic citations which required his appearance in court the following Monday. He also told Landry to pull over to the barricades near the water and to "sober up" for an hour and a half before driving his car again. He did not confiscate Landry's keys, but warned him that if he left early there would be a warrant out for his arrest. Couser admitted making the statement about not booking Landry, but said it was given merely to impress upon Landry the seriousness of his conduct. During his testimony, Couser volunteered information that he wanted "in the worst way" to arrest Landry, but did not believe he had authority to do so. Officer Copeland testified that he would have booked Landry for drunkenness, and the government has since stipulated that Couser had probable cause to make an arrest. While

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(Continued from previous page)

were given, but described entirely different tests than those Couser claimed to have given. In addition, Constable Garcia and his assistant, Guadalupe Garcia, testified vaguely as to the sobriety tests, although, Constable Garcia also described entirely different tests, and Guadalupe Garcia was so far from the scene it is doubted that he could have determined whether or not one was, in fact, given.

[3] The believable evidence indicates that since arriving at the beach, Landry had smoked 4 marijuana cigarettes and consumed 14 ounces of alcohol.

Couser denies he told Landry to not drive his car "until he sobered up," Landry, the girls, and Ranger Copeland testified that Couser did so. Furthermore, Couser admitted that he told Landry to not drive his car for one and a half hours, but testified implausibly that it was only to frighten him and had nothing to do with the state of his sobriety.

Immediately after Couser left the scene with the girls, Landry took off at high speed and drove to Debbie's house, arriving before they did and hiding his car in a field behind the house waiting for their return. When the girls arrived with Debbie's mother after 5:00 P.M., but before 6:00 P.M., Landry talked with them. He still appeared to be drunk. He was there about five minutes and left. In the meantime, back at the beach one of the rangers noted that Landry had left the barricade early in defiance of Couser's instructions. The ranger immediately informed Couser of this fact, but Couser elected to not seek the arrest warrant he had threatened.

Landry testified that when he left the girls he had $16.00 in his pocket and was going to go out and "live it up one more time," since he would undoubtedly be going back to jail. He was serving probation from a prior felony (burglary) and realized that the citations he had received would probably cause a revocation of his probation and a period of confinement. After leaving the girls he picked up a friend, James Wallace, bought two more bottles of whiskey and, in his terminology, "went home to drink it up." A number of his friends dropped by that evening and the partying continued into the late hours. At some time after midnight Landry left to drive Wallace home. On the way back to his house he was speeding and

intoxicated. He attempted to pass 3 cars at one time while driving at 80 mph down a narrow (25 foot wide) two lane road. He saw a single light approaching in the oncoming lane. He thought he could make it. Landry collided with plaintiff in plaintiff's lane. Plaintiff, who was on a motorcycle, suffered a severed left arm as a result of the collision and had his left leg later amputated above the knee because of its severe mutilation.

The investigating officer observed Landry's slurred speech, glazed eyes, and unsteady manner. He gave Landry a sobriety test, which he failed, arrested him and took him to the hospital. The accident occurred at 1:40 A. M. At 3:00 A.M. blood samples were taken from Landry which revealed a blood alcohol content of .104 – presumptive intoxication under Texas law.

Two experts testified by desposition: Dr. Willett Taylor for the defendant and Dr. James May for the plaintiff. Their testimony was consistent on most major issues. They both testified the body dissipated alcohol at the rate of .01 per hour. Computing backwards from the date the blood sample was taken to the time of the accident and applying the .01 rate thereto, it would appear that Landry had a blood alcohol content in excess of .105 at the time of the accident.

Dr. Taylor testified that if Landry had a .10 blood alcohol content at the time he was detained by Couser at Padre Island National Seashore, it would have been dissipated at the rate of .01 per hour and left him legally sober, although impaired, at the time of the accident. However, he also testified that the combination of alcohol

and marijuana greatly increases the effect on an individual, which leads this Court to conclude that some of the impairment under which Landry suffered at the time of his detention at Padre Island National Beach remained in his system and contributed to the impairment that caused the accident. Furthermore, although without the new ingestion of liquor he might have been legally sober at the time of the accident, it was foreseeable to a reasonable law enforcement officer that a person who was high on alcohol and/or marijuana at 3:40 in an afternoon would continue to not have normal control of his faculties for several hours into the evening. More importantly, Dr. Taylor testified it was foreseeable to a reasonable law enforcement officer that this person would go out looking for more alcohol and/or marijuana in order to maintain his state of euphoria.[4] Finally, Dr. Taylor also testified at page 51 of his deposition that the amount of alcohol and marijuana consumed before 3:00 P.M. would contribute to the impairment at 1:40 the following morning, although the impairment was considerably increased by the post-3:40 P.M. consumption.

Dr. May testified that impairment from the use of marijuana could last well over 24 to 48 hours, that abuse of marijuana commonly caused red eyes, and that the combined use of alcohol and marijuana could continue

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[4] Richard Barry, First Assistant Nueces County Attorney, testified as an expert that Landry should have been arrested and that under the facts of this case, Ranger Couser had no discretion, under Texas law or custom, to not take him into custody. He also testified that qualified law enforcement officers would have expected that Landry would continue to drink and get high were he not detained.

impairment for a longer period than from the mere use of alcohol. He also testified that it was foreseeable that a person consuming alcohol and marijuana would be likely to continue the practice until some dramatic event such as death, injury, or arrest caused a cessation.

II

CONCLUSIONS OF LAW

1. Under the Federal Torts Claims Act, the United States of America is liable in this jurisdiction for the negligent acts of its National Park Rangers: "Subject to the provisions of [28 U.S.C. §§2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). *See, Smith v. United States,* 375 F.2d 243 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967) (the day-to-day activities of law enforcement officers in carrying out their duties are reviewable by the courts under the F.T.C.A.); *Downs v. United States,* 522 F.2d 990 (6th Cir. 1975) (actions of law enforcement officers in carrying out their day-to-day performance of duties is not protected by the "discretionary function" exception of the F.T.C.A.).

2. The United States, if a private person, would be liable to plaintiff under Texas state law where the negligent acts occurred. Texas state law permits personal liability without immunity of a law enforcement officer for the negligent performance of his or her official duties if that performance proximately caused the injury. *State of Texas v. Terrell*, 588 S.W.2d 784 (Tex. S. Ct. 1979); *Eubanks v. Wood*, 304 S.W.2d 567 (Tex. Civ. App. Eastland 1957); *Asher v. Campbell*, 50 Fed. 818 (5th Cir. 1982).

3. Texas penal law prohibits driving while intoxicated. Art. 6701 1-1 defines intoxicated to mean: (a) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug or a combination of two or more of those substances into the body, or (b) having an alcohol concentration of .10 or more. Texas penal law was assimilated under the circumstances of this case as a federal offense pursuant to the Assimilative Crimes Act, 18 U.S.C. section 13.

4. Possession of two ounces or less of marijuana is a Class B misdemeanor in Texas. Possession of two to four ounces is a Class A misdemeanor. Possession of more than four ounces is a felony. An arrest can be made for either misdemeanor. Tex. Rev. Civ. Stat. art 4476-15 § 4.051. A Texas peace officer has an affirmative duty to arrest a suspect for possession of marijuana. Tex. Code Crim. Proc. art. 2.13. *See also*, 18 U.S.C. § 13 (state penal law proscribing possession of 4.5 grams of marijuana assimilated under the circumstances of this case as a federal offense).

5. Rangers Couser and Copeland had probable cause to make a custodial arrest of John Landry when they stopped him at Padre Island National Seashore on July 23, 1983.

6. 21 U.S.C. § 881(A)(4) and 49 U.S.C. §§ 781, 782 gave Rangers Couser and Copeland authority to confiscate John Landry's vehicle.

7. The failure of rangers Couser and Copeland to arrest John Landry at Padre Island was the negligent performance of their official law enforcement duties and a proximate cause of plaintiff's injuries.

8. Defendants should have recognized possible danger of harm to third persons from Landry's behavior. Rangers Couser and Copeland had a duty to third persons because they could exercise some measure of reasonable control over a dangerous person. *See, Otis Engineering v. Clark,* 668 S.W.2d 307 (Tex. S. Ct. 1984).

9. Alleged acts of Liquid Town, if true, would be a concurrent cause of Crider's accident and not intervening and superseding acts. *Bell v. Campbell,* 434 S.W.2d 117, 122 (Tex. 1968). A reasonable person should have expected Landry to attempt to ingest more alcohol and smoke more marijuana.

10. A foreseeable harm is not a superseding cause, even if it is a substantial contributing factor. The additional alcohol and marijuana consumed by Landry after he was stopped by Ranger Couser was a substantial contributing factor to the accident with Crider.

11. If Couser and Copeland had not negligently performed their duties, Landry would have been incarcerated the evening of July 23 and morning of July 24, 1983.

12. The residue from Landry's initial intoxication at the beach was a contributing cause to the accident with Crider.

13. It was reasonably foreseeable that Landry would remain intoxicated on the evening of July 23, 1983, and that Landry's impaired state could cause harm to others.

14. Upon agreement by the parties, defendant Liquid Town, Inc. is DISMISSED from this litigation.

Dated: June 30, 1988.

/s/ Spencer Williams
UNITED STATES
DISTRICT COURT
JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

RANDY W. CRIDER, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. C-84 261 ORDER CORRECTING FINDINGS OF FACTS AND CONCLUSIONS OF LAW

It has come to the attention of this court that its Findings of Facts and Conclusions of Law in this case contain certain typographical errors and misstatements. The court hereby amends and corrects that order in the following fashion: page 2, line 15 should read "July 23, 1983"; page 4, line 16 should read "grams of marijuana butts" instead of ounces of marijuana; page 4, line 19 should read "7 unopened bottles" instead of 8 bottles; page 5, line 1 should read "Kleberg County"; and the citation on page 11 should be corrected to "*Asher v. Cabell*, 50 Fed. 818 (5th Cir. 1892)." All other aspects of the court's Findings of Facts and Conclusions of Law shall remain the same.

IT IS SO ORDERED.

DATED: 8/5/88

/s/ Spencer Williams
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RANDY WILLIAM CRIDER AND MILA ABUD CRIDER, ET AL	) CA NO. C-84-261
VS.	)
UNITED STATES OF AMERICA, ET AL	) HOUSTON, TEXAS) MARCH, 17, 1988

EXCERPT OF TRIAL
COURT'S RULING
[BEFORE THE HONORABLE SPENCER WILLIAMS]

[Appearances omitted in printing]

THE COURT: Well, I've probably never been in a better position than right now to decide this case. This is a very difficult case in many respects. I'm not a deep-pocket type of a judge. I don't go around looking for ways to create rights that don't exist in order to remedy an otherwise inequitable situation.

In Sacromento [sic] not long ago a young man was permanently crippled because of an alleged defective football helmet, and the jury found for the defendant in a most appealing case, as you can imagine.

I'm not a judge who goes around making laws willy-nilly in order to solve what I believe to be pressing social problems. I look to the legislature, I look to the cases, I try to determine – make my decisions based on the law as I see it and the facts as I find them, and this is how I'm deciding this case.

This case is really a credibility-of-the-witness case. Who do you believe, the rangers, or do you believe Landry and the girls.

There are so many inconsistencies in the testimony of the rangers as to bring great doubt to either their recollection or their veracity.

The testimony of the girls, although they were young girls and it was a long time since they were deposed, they testified; not identically, there were some differences, but it convinced me that they were testifying honestly as best they could. I think it's a day they will remember the rest of their lives. They were frightened, and that does lend to recall. In fact, it used to be in ancient law when they wanted to have the marking of a boundary remembered by someone who had lived a long time, they would take a little kid up there and they would say, this is the boundary, and hit him up beside the head so they would remember. They don't do that any more, I guess. But, anyway, that was a way of creating – inflicting a memory, making it stick. Though I do believe that the young ladies were the more believable.

If you accept the rangers' scenario, I think there may not have been negligence, even though there was probable cause to make an arrest. But if you accept the story of what happened as told by the girls and Landry, it's an entirely different picture.

I think the testimony of Maxwell Hancock was based on his belief from the testimony of the rangers. And his conclusion, if those are the facts, would have been reasonable.

But I have a different view of the facts and I find them to be as testified, that the girls went down to the beach with Landry after they called him, he came and picked them up about 12:30, went down to the beach, he had pre-rolled a number of marijuana cigarettes, whether it was four or six, it was a substantial amount, and he consumed, by my review of the testimony, about seven or eight ounces of liquor in a period of thre-and-a-half [sic] hours, that he was drunk, that he endangered their lives by this foolish ride, which they enticed him into doing, but he participated, he endangered their lives and that at the time that he was – they were stopped the officer Couser said that, "I wished in the worst way I could have arrested him." That sounded like an overstatement to me. And there are ways that they could have arrested him and did not do that.

It's incredible the difference in the testimony as to the test for sobriety. Landry and the girls said there was no test and the others said there was, but each description of the test was different.

The statement that, "I believe it was said to Landry, go over until you sober up." His partner testified that that was the statement, the girls testified and Landry testified.

And the other reason given is not credible: "I wanted to commit – I was vindictive, I wanted to – I made an unlawful order." He would realized he was in serious business, there was trouble. I think that for whatever reason, he could have made the arrest and did not and it was negligent.

If they are not trained, they should be trained. They should know – a reasonable person should know that a person who is intoxicated on a combination of liquor and the scenario, is on a big high and they want to keep that high going until they get arrested or pass out or get killed. In this situation, he was able to get additional liquor. That shouldn't be – as a minor, that shouldn't be unusual, he had it in his possession at the time. He should be able to get additional marijuana, because he had that in his possession at the time.

Furthermore, it was incredible to me that the officers could smell the liquor but could not smell the marijuana. The front ashtrays were full of marijuana butts. And there was testimony that if you smoke marijuana in the car you could smell it for days afterwards. And the pipe – the pipe was manufactured to smoke the marijuana was on the front seat. It all tied with the testimony of the girls that he was sitting in the car smoking marijuana and drinking.

And so, I find that their testimony and the credibility of the witnesses test as against those of the rangers makes it clear to me that the act was negligent and that it was a direct consequence of the – contributing factor in the accident that damaged the plaintiff.

I will prepare findings of facts and conclusions of law in this matter, or memo opinion. That's the judgment of the Court.

I would like to see counsel in chambers briefly to discuss set the timetable for our further consideration of damages in the matter.

We will stand recess about five minutes.

[Court reporter's certificate omitted in printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2944

RANDY WILLIAM CRIDER,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/10/89, 5 Cir., 198___, ___ F.2d ___)

(December 6, 1989)

Before GEE and JONES, Circuit Judges, and HUNTER,* District Judge

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones 12/4/89
United States Circuit Judge

No. 89-1380

In the Supreme Court of the United States

OCTOBER TERM, 1989

RANDY WILLIAM CRIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
DEBORAH RUTH KANT
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the United States is not liable under the Federal Tort Claims Act for injuries caused by an intoxicated driver after federal law enforcement officers declined to arrest him, where state law imposes no corresponding duty on private persons or law enforcement officers to restrain an intoxicated driver in order to prevent possible injury to third parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulation:

Miscellaneous:

In the Supreme Court of the United States

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RANDY WILLIAM CRIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 885 F.2d 294. The opinion of the district court (Pet. App. A15-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1989, and a petition for rehearing was denied on December 6, 1989. Pet. App. A33. The petition for a writ of certiorari was filed on March 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680, petitioner seeks to recover damages from the United States for injuries he sustained in a collision between the motorcycle he was riding and an automobile driven by a private citizen, John Landry.

1. On July 23, 1983, at approximately 3:40 in the afternoon, two Park Rangers of the United States Park Service stopped Landry, who was speeding along the beach of the Padre Island National Seashore with two fifteen-year-old girls riding on the hood of his car. The Rangers detected the aroma of alcohol on Landry's breath, and a subsequent search of his car revealed four ounces of marijuana butts and leaves, a homemade pipe for smoking marijuana, a partially empty bottle of whiskey, and eight bottles of beer. The Rangers issued citations to Landry for possesion of a controlled substance, possession of alcohol by a minor, speeding, and failure to have mandatory liability insurance. These citations required Landry to appear before a United States Magistrate the following Monday. Landry was not charged with driving under the influence of alcohol or drugs. Pet. App. A2, A17-A20.

After issuing the citations, one of the Rangers told Landry not to drive for an hour and a half so that he could sober up. The two Rangers then left to take the teenage girls to their station and arrange other transportation home for them. Landry did not heed the Ranger's instructions and departed immediately. Later in the day, he picked up a friend, James Wallace, and made an illegal purchase of whiskey. Throughout the evening and into the early morning, he drank alcohol and smoked marijuana. At 1:40 in the morning of July 24, while speeding and attempting to pass three cars, Landry collided with petitioner, who sustained serious injuries. Pet. App. A2-A3, A20-A21.

2. Petitioner thereafter brought the instant FTCA suit in the United States District Court for the Southern District of Texas. He alleged that the Park Rangers were negligent in failing to charge Landry with driving under the influence of alcohol or drugs and to arrest him when they stopped him on the afternoon of July 23, 1983. Petitioner further alleged that the Rangers' conduct contributed to his injuries, because Landry would have been incarcerated, rather than driving on the highway, if they had taken him into custody and impounded his vehicle.

The district court entered judgment in favor of petitioner and awarded him $7.5 million in damages. Pet. App. A1, A15-A26; Dist. Ct. Judgment (entered June 29, 1988). The district court held that the decision to institute criminal proceedings through citations that required Landry's appearance in federal court, rather than through a custodial arrest, did not fall within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), because such day-to-day law enforcement decisions are not, in the court's view, discretionary. Pet. App. A23. The court also believed that Texas tort law imposed a duty on policemen to exercise due care in carrying out law enforcement responsibilities that might have an effect on third parties. In finding such a duty under state law, the court relied, *inter alia*, on Texas precedents holding the State and its police officers liable for the officers' traffic accidents, Pet. App. A24 (citing *State* v. *Terrell*, 588 S.W.2d 784 (Tex. 1979); *Eubanks* v. *Wood*, 304 S.W.2d 567 (Tex. Civ. App. 1957), writ ref. n.r.e.), and holding an employer liable for the torts of an intoxicated employee. Pet. App. A25 (citing *Otis Engineering Corp.* v. *Clark*, 668 S.W.2d 307 (Tex. Civ. App. 1984)).[1]

[1] The district court also relied on a Fifth Circuit decision rendered in 1892, more than 50 years prior to enactment of the FTCA. Pet. App. A24 (citing *Asher* v. *Cabell*, 50 F. 818 (1892)). There, a United States

The district court further held that the Rangers' failure to arrest Landry and take him into custody proximately caused petitioner's injuries. Pet. App. A24-A26. The court relied in part upon testimony that the residue of the alcohol and marijuana consumed by Landry before the Rangers stopped him during the afternoon of July 23 contributed to the accident ten hours later. *Id.* at A21-A22, A26. The court also found it foreseeable that Landry would remain intoxicated, presumably by consuming more alcohol later in the evening, and that his resulting impaired state could cause harm to others. *Id.* at A26.

3. A unanimous panel of the court of appeals reversed the judgment in favor of petitioner (Pet. App. A1-A14), finding that Texas tort law does not impose an analogous duty on private persons to restrain drunk drivers or on state law enforcement officers to arrest or restrain a suspect in order to prevent injuries to third parties. *Id.* at A4-A14.

With respect to private persons, the court of appeals concluded that the Texas courts have imposed a duty to restrain intoxicated persons only in limited circumstances involving a special relationship between the two parties – for example, where there was an employer-employee relationship between the parties and the employer affirmatively exercised control over the employee. Pet. App. A9-A13, discussing *Otis Engineering Corp.*, *supra*. Beyond this "unique species of liability premised on the employer-employee relation," the court of appeals found that Texas law imposes no other duty on private persons to restrain or control intoxicated persons. *Id.* at A13. The court also observed that Section 319 of the Restatement (Second) of Torts (1965), does not supply a basis for liability, because (i) Texas law has not fully adopted the duty of reasonable care Section 319 im-

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Marshal was held personally liable under the Texas wrongful death statute for his negligent failure to protect a prisoner in his custody.

poses on one "who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others," and (ii) the duty imposed by Section 319 is inapplicable here in any event because petitioner's suit rests on the different theory that the Park Rangers did *not* take charge of Landry and were negligent in failing to do so. Pet. App. A14.

The court of appeals likewise held that Texas tort law does not impose any duty on state police officers "to protect the public from acts of a criminal suspect." Pet. App. A7. Although it noted that police officers may owe a duty to the public in general, the court found no Texas precedent for the proposition that a police officer owes an actionable duty to any particular member of the public, such as petitioner. *Id.* at A7-A8. Quoting one Texas appellate decision that rejected such a theory of liability, the court of appeals explained that if law enforcement officers were liable for their decisions regarding "if, how, and when to arrest a person, * * * then, to avoid liability, police officers would have to *arrest all persons* stopped by them * * * . Sound jurisprudence as well as the public interest could not tolerate such a holding." *Id.* at A8 (quoting *Dent* v. *City of Dallas*, 729 S.W.2d 114, 116 (Tex. Ct. App. 1986), writ ref. n.r.e., cert. denied, 485 U.S. 977 (1988)).

ARGUMENT

Since Texas law does not impose an actionable duty on either private persons or law enforcement officials to take an individual into custody to prevent injury to a third party, the court of appeals correctly held that the United States is not liable for the injuries sustained by petitioner as a result of the conduct of a private party (John Landry). The court of appeals' resolution of that question of state law does not conflict with any decision of this Court or of another court

of appeals and presents no question of general importance warranting review. In fact, petitioner does not present that question for review (see Pet. i), and he makes virtually no effort to challenge the court of appeals' disposition of it. Instead, petitioner seeks to raise for the first time in this litigation the distinct contention that the United States should be held liable under the doctrine of negligence per se, based on what he claims are mandatory federal regulations that required the Rangers to take Landry into custody. It is too late for petitioner to inject that new theory of liability into this case, and his negligence per se argument is without merit in any event because no federal regulations imposed such a duty on the Rangers. The petition for a writ of certiorari therefore should be denied.

1. Petitioner does not seriously challenge the court of appeals' holding that Texas law did not impose an actionable duty on the Park Rangers to arrest Landry in order to prevent injuries he might cause to petitioner.[2] Petitioner only goes so far as to characterize that holding as "questionable" and to assert in a footnote that the court of appeals erred in declaring that Section 319 of the Restatement (Second) of Torts (1965) does not reflect Texas law. See Pet. 16 & n.8. Contrary to petitioner's assertion, however, the Texas

[2] As the court of appeals pointed out (Pet. App. A9 n.3), a clear majority of other States likewise have declined to impose liability in circumstances such as these.

The government argued in the court of appeals that any duty of law enforcement officers under state law was not relevant under the FTCA, since the Act abrogates the sovereign immunity of the United States only where a "private individual" would be liable "under like circumstances." 28 U.S.C. 2674; see Pet. App. A5. In view of the holding of the court of appeals – that no such duty exists under state law – that issue is not presented by the petition. We believe, however, that this argument furnishes an alternative ground to support the judgment below.

Supreme Court did not adopt Section 319 in its entirety in *Otis Engineering Corp.*, *supra*; it relied on Section 319 in imposing a duty only in limited circumstances arising out of an employer-employee relationship. More importantly, as the court of appeals explained, Section 319 by its terms applies only *after* a person has taken charge of a dangerous person. Pet. App. A14.[3] Here, however, it is undisputed that the Park Rangers did not take Landry into custody or otherwise take charge of him. As a result, even if we assume arguendo that the Texas courts would adopt Section 319 of the Restatement in its entirety, the duty described in Section 319 was never triggered in this case. Accordingly, the court of appeals' application of Texas law was not "questionable"; it was correct.

Texas law is by no means unique in declining to impose an actionable duty on law enforcement officers in these circumstances. It is a firmly rooted principle of the common law that neither the government nor a law enforcement officer it employs owes a duty to a particular member of the public to prevent injuries that might be sustained by a breach of the peace or other violation of the law. As this Court has observed, "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Turner* v. *United States*, 248 U.S. 354, 358 (1919); see also *South* v. *Maryland*, 59 U.S. (18 How.) 396 (1856).[4] This

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[3] Section 319 states:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

[4] This substantive rule of tort law is closely related to the principle that a private person ordinarily does not have standing to procure

principle has been recognized in numerous cases arising under the FTCA as well. See, *e.g.*, *Frigard* v. *United States*, 862 F.2d 201, 203 (9th Cir. 1988), cert. denied, 109 S. Ct. 2448 (1989); *Prelvitz* v. *Milsop*, 831 F.2d 806, 810 (8th Cir. 1987); *Georgia Casualty & Surety Co.* v. *United States*, 823 F.2d 260, 263 (8th Cir. 1987); *Abernathy* v. *United States*, 773 F.2d 184, 188-190 (8th Cir. 1985); *Bergmann* v. *United States*, 689 F.2d 789, 796 (8th Cir. 1982); *Redmond* v. *United States*, 518 F.2d 811, 816 (7th Cir. 1975). The court of appeals' adherence to these settled principles in its application of Texas law does not warrant further review. Indeed, as the court of appeals explained, relying on a Texas decision declining to impose liability in similar circumstances, a contrary rule would require police officers to arrest all persons whenever probable cause exists, because of the possibility that suspects might cause harm to third parties. Pet. App. A8.

2. Instead of challenging the court of appeals' holding that Texas law does not impose an actionable duty on law enforcement officers to arrest a suspect in circumstances such as those presented here, petitioner argues (Pet. 13-19) that the United States should be held liable under the doctrine of negligence per se for the Park Rangers' alleged violation of *federal* regulations that, in petitioner's view, required them to arrest Landry. Petitioner did not advance this distinct theory of liability in either court below, and there accordingly is no reason for this Court to consider it. *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 604 (1990); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).[5] That is

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enforcement of the laws. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

[5] Although the Park Service's internal manual, discussed below, was in the record before the district court, petitioner relied on the manual not to establish that the Rangers owed him a duty but only to show

especially so since petitioner's theory would require the Court to consider questions of Texas tort law (concerning the doctrine of negligence per se) that are better resolved by the lower federal courts in the first instance. In fact, petitioner concedes (Pet. 18) that this Court does not ordinarily pass on questions of state law in the first instance, particularly where those questions have not been raised below. See *Sheridan* v. *United States*, 487 U.S. 392, 401-402 (1988). There is no reason for the Court to depart from that settled rule here.

In any event, this case would not present the Court with an appropriate occasion for exploring the potentially complex interaction between mandatory federal regulations and a duty imposed by state tort law under the doctrine of negligence per se, because there was no mandatory federal regulation applicable here that could furnish the necessary predicate for invocation of that doctrine. No Park Service regulation prescribes when, and under what circumstances, a Park Ranger must charge a suspect with driving under the influence of alcohol or drugs and must arrest the suspect on that charge. Petitioner cites (Pet. 4) 36 C.F.R. 4.6 (1986), but that regulation merely prohibits driving under the influence of intoxicating liquor or drugs; it does not dictate what action a Park Ranger must take if he stops a suspect.

Petitioner also relies (Pet. 4-5, 9-10) on the Law Enforcement Procedures of the Padre Island National Seashore. However, those Procedures are internal guidelines for the benefit of law enforcement personnel. They do not have the force of formal regulations that prescribe actionable duties owed to an individual member of the public, such as petitioner.[6] Moreover, the portion of the Procedures

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that the Rangers' actions did not fall within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).

[6] As the Texas Supreme Court has explained, the doctrine of negligence per se comes into play only if there is an "unexcused viola-

upon which petitioner relies contains a checklist of factors to guide a Park Ranger once the Ranger has decided to charge a suspect with driving under the influence of alcohol or drugs: if a suspect is charged with that offense, the Ranger is instructed to arrest him and impound the vehicle. Here, however, as found by the district court and affirmed by the court of appeals (Pet. App. A2, A19), the Park Rangers decided not to charge Landry with driving under the influence of alcohol or drugs, but instead to charge him with the lesser offense of possession of alcohol and drugs. The Law Enforcement Procedures of Padre Island National Seashore do not speak to this antecedent question of what charges a Park Rangers should prefer in the first place. Because petitioner has not identified any federal regulation that mandated a particular course of action by the Park Rangers, the doctrine of negligence per se cannot give rise to liability in this case—even if we assume, arguendo, that the other prerequisites (see Pet. 13-16, 18) necessary for application of that doctrine under Texas law were satisfied. See note 6, *supra*.[7]

Petitioner's reliance (Pet. 17-18) on *Doggett* v. *United States*, 875 F.2d 684 (9th Cir. 1989), in support of his new negligence per se theory is misplaced. In *Doggett*, there

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tion of a statute or ordinance" and "such statute or ordinance was designed to prevent injury to the class of persons to which the injured person belongs." *Nixon* v. *Mr. Property Management Co.*, 690 S.W.2d 546, 549 (1985). Even if the internal checklist of procedures for the various criminal charges constitutes a mandatory regulation, nothing in this checklist suggests that it was intended to establish an actionable duty to any individual member of the public.

[7] For similar reasons, petitioner errs in relying (Pet. 12) on the Good Samaritan doctrine. In the absence of a binding federal regulation, there is simply no undertaking the government can be said to have assumed. See *Sheridan* v. *United States*, 487 U.S. at 401; *Moody* v. *United States*, 774 F.2d 150, 156-157 (6th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

was a specific California statute rendering public entities liable for violations of mandatory enactments, and the Ninth Circuit concluded that a federal regulation imposed duties on federal officers comparable to those imposed by a mandatory enactment under California law. *Id.* at 690-693. In this case, by contrast, petitioner concedes (Pet. 18) that Texas has no comparable statute imposing liability for violations of mandatory enactments, and, as we have shown (see pages 9-10, *supra*), there is in any event no federal enactment (or analogous regulation) requiring Park Rangers to charge an individual with driving under the influence of alcohol or drugs and to arrest the suspect.[8]

In the absence of any regulation that could be construed to trigger the doctrine of negligence per se, it is well settled that the existence of a federal statute or regulation does not itself create a duty for purposes of state tort law or give rise to a cause of action against the United States under the FTCA for injuries sustained as a result of a violation of the statute or regulation. *Art Metal-U.S.A., Inc.* v. *United*

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[8] There would be further difficulties in imposing liability on the United States under the FTCA on a negligence per se theory in the circumstances of this case, in light of the firmly established principle, discussed above (see pages 7-8, *supra*), that the government does not have an actionable duty to enforce the law in order to prevent injuries to third parties. If that settled principle is to be changed with respect to the actions of *federal* law enforcement officers, it is the responsibility of Congress to enact the necessary statute. Only Congress is in a position fully to weigh the competing considerations, including the potential adverse effects on the liberties of private individuals and the performance of traditionally discretionary federal law enforcement activities. At the very least, a federal regulation should not be read to impose an actionable duty on federal law enforcement officers in circumstances such as these in the absence of the clearest expression of an intent to that effect by the federal officials responsible for promulgating that regulation. Petitioner has pointed to no such expression here.

States, 753 F.2d 1151, 1157 (D.C. Cir. 1985); *Sellfors* v. *United States*, 697 F.2d 1362, 1365-1367 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984); *United Scottish Ins. Co.* v. *United States*, 614 F.2d 188, 194 n.4 (1979), aff'd after remand, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds *sub nom. United States* v. *Varig Airlines*, 467 U.S. 797 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
DEBORAH RUTH KANT
Attorneys

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No. 89-1380

In The

Supreme Court of the United States

October Term, 1989

RANDY WILLIAM CRIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

BENJAMIN H. B. SLEY
Suite 600 – South Tower
MBank Center
500 N. Water Street
Corpus Christi, Texas 78471
(512) 888-8866

P. MICHAEL JUNG
Counsel of Record
SIDNEY POWELL
STRASBURGER & PRICE
4300 NCNB Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITIONER'S REPLY MEMORANDUM

The petitioner Randy William Crider respectfully submits this reply memorandum in support of his petition for a writ of certiorari in this matter.

ARGUMENT

This case is not, as the government mischaracterizes it, *see* Brief for the United States in Opposition ("U.S. Brief") at 7-8, a "negligent failure to enforce the law" case. Nor is it, as the Court of Appeals mischaracterized it, *see* Petition at A-13-14, a "negligent failure to take into custody" case; indeed, the government admitted from the outset that the park rangers "exercised control over John Landry such that Landry was not free to leave the scene

at the time he was stopped."[1] This is instead a "negligent release from custody" case, just as it would have been if the rangers had taken control of a grenade-wielding terrorist in an airport departure lounge and then released him, fully armed.

I. THE GOVERNMENT CANNOT JUSTIFY THE DECISION BELOW ON THE BASIS OF STATE LAW.

The government profoundly errs in stating that petitioner Crider "does not seriously challenge the court of appeals' holding that Texas law did not impose an actionable duty on the Park Rangers . . . ." U.S. Brief at 6. Crider indeed challenges that indefensible holding with the utmost sincerity and vigor. Both parties have acknowledged, however, that the issue of state law duty (apart from the effect of the federal regulations) is not before this Court.[2] Notwithstanding this acknowledgment, the government, perhaps in an effort to minimize the importance of this case or to "poison the well," devotes substantial energy and space to an argument that the Court of Appeals' state law holding was correct. U.S. Brief at 4-8. This immaterial contention warrants at least a minimal response.

The Supreme Court of Texas in *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 311 & n.2 (Tex. 1983), quoted and relied heavily on Restatement (Second) of Torts § 319 (1965), which fits this case like a glove:

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[1] Standard Joint Pretrial Order at 8, ¶ 10; *see also* Trial Transcript at 298-99 (testimony of Ranger Couser).

[2] *Compare* Petition at 18 *with* U.S. Brief at 6, 9.

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Otis cannot be limited to its facts, as the government seeks to do, U.S. Brief at 6-7; Section 319 knows no "employer-employee" limitation. Moreover, the *Otis* court not only referred to "the duty to the employer *or one who can exercise charge over a dangerous person,*" 668 S.W.2d at 311 (emphasis supplied), but also relied in reaching its decision on an out-of-state case[3] not involving the employer-employee relationship, *id.* at 310.

Nor is the state law rule different in the law enforcement context. In *Dent v. City of Dallas*, 729 S.W.2d 114 (Tex. App. – Dallas 1986, writ ref'd n.r.e.), *cert. denied*, 485 U.S. 977 (1988), on which the government places heavy reliance, the lawbreaker who caused injury to the plaintiff was neither under the officer's control[4] nor observably dangerous to others;[5] thus § 319 liability was not implicated. Moreover, the government fails to acknowledge that a sequel to *Dent*, *Travis v. City of Mesquite*, 764 S.W.2d 576 (Tex. App. – Dallas 1989, writ granted), has

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[3] *Leppke v. Segura*, 632 P.2d 1057 (Colo. Ct. App. 1981).

[4] The officer had ordered the suspect to pull onto the shoulder of the road; the suspect began to do so but then fled at high speed. 729 S.W.2d at 115.

[5] The suspect was stopped not because of any physical condition or behavior, but because he fit the description of someone who had passed a forged prescription a short time before. 729 S.W.2d at 115.

been accepted for review by the Supreme Court of Texas and is ripe for decision and probable reversal.

In short, there is no basis for the Court of Appeals' determination that Texas courts would not impose liability, based on § 319 and related principles, under the facts of this case.

II. THIS CASE INVOLVES A PROPERLY PRESERVED, IMPORTANT, AND UNRESOLVED ISSUE OF FEDERAL LAW.

At the outset, the government's claim that Crider did not raise below the contention that the Law Enforcement Procedures of Padre Island National Seashore imposed an actionable duty on the rangers, *see* U.S. Brief at 6, 8, cannot go unchallenged. At all stages of the case, Crider has urged that the regulations created a mandatory duty for the rangers to retain custody of Landry. Because the district court held that liability existed on the basis of general Texas tort law, the status of the mandatory duty under the regulations as an independent source of liability did not emerge as an issue until the Court of Appeals' decision. Thereafter, Crider raised in the Court of Appeals the precise contention made here: that the regulations created an actionable duty independent of the state common law of torts.[6]

The government attempts to avoid the effect of the regulations by arguing first that they are not regulations

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[6] Suggestion for Rehearing En Banc [and for panel rehearing pursuant to Fifth Circuit Internal Operating Procedures] at 6-7.

at all, U.S. Brief at 9, and second that they apply only after the decision to charge a suspect with a particular offense has been made, U.S. Brief at 9-10. Neither contention is supported by the record. The fact that the regulations did not appear in the Code of Federal Regulations does not prevent them from creating an actionable duty; this was true of the naval regulations which gave rise to such a duty in *Doggett v. United States*, 875 F.2d 684 (9th Cir. 1989), and, apparently, of those at issue in *Sheridan v. United States*, 487 U.S. 392 (1988), as well. Nor does calling the regulations "internal guidelines," *cf.* U.S. Brief at 9, gainsay the mandatory duty which they imposed for the protection of the public. Finally, the language of the procedures prescribed for situations involving "DWI's" (driving while intoxicated) and "DUID" (driving under the influence of drugs), as well as those for other situations, clearly indicates that the regulations prescribe (as their title states) "law enforcement procedures" and not merely "post-charge procedures."[7]

Apart from an unavailing attempt to distinguish *Doggett*, *see* U.S. Brief at 10-11,[8] the government does not

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[7] For example, the "DWI's" procedure specifies that a suspect who passes a breathalizer test is to be issued a violation notice for careless driving, Plaintiff's Exhibit 15, thus indicating that it governs all situations in which a suspect has *actually* driven while intoxicated, not merely those in which a decision has been made to charge a suspect with that offense.

[8] Although Texas has no *statutory* law of negligence *per se* based on the violation of mandatory regulations as did California in *Doggett*, the Texas common law acknowledges such liability. *E.g.*, *Continental Oil Co. v. Simpson*, 604 S.W.2d 530, 534 (Tex. Civ. App. – Amarillo 1980, writ ref'd n.r.e.).

seriously challenge the concept that a federal regulation may form the basis for liability under the state law of negligence *per se* in a Federal Tort Claims Act case. It does argue, however, that "an actionable duty to enforce the law in order to prevent injuries to third parties" must stem from a federal statute or expression of regulatory intent to create such liability. U.S. Brief at 11 n.8. This unsupported argument is easily answered: Congress has made an *a priori* decision that the United States' tort liability is to be measured by state law, not by federal enactments specific to each situation in which such liability potentially arises. Texas, in turn, has determined that tort liability will arise from the violation of mandatory administrative regulations whose purpose is to protect against the kind of injury which has occurred. Finally, the federal authorities at Padre Island National Seashore have wisely required that federal law enforcement personnel retain custody of drivers who are under the influence of alcohol or drugs, for the obvious purpose of protecting the public from injury at the hands of such drivers.

This Court has resolved the effect of mandatory federal regulations on the "discretionary function" exception to the FTCA,[9] and on the "assault and battery" exception.[10] It is now time to address a more fundamental question, as to which the lower courts have been "not entirely harmonious," *Schindler v. United States*, 661 F.2d 552, 560 (6th Cir. 1981), namely the "interplay" of such

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[9] *Berkovitz v. United States*, 486 U.S. 531 (1988).

[10] *Sheridan v. United States*, 487 U.S. 392 (1988).

regulations with the state law of negligence. That question is squarely presented to the Court in the present case, and warrants review.

Respectfully submitted,

BENJAMIN H. B. SLEY
Suite 600 – South Tower
MBank Center
500 N. Water Street
Corpus Christi, Texas 78471
(512) 888-8866

P. MICHAEL JUNG
Counsel of Record
SIDNEY POWELL
STRASBURGER & PRICE
4300 NCNB Plaza
901 Main Street, LB 175
Dallas, Texas 75202
(214) 651-4724